



REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL

SITTING AT LILONGWE

M.S.C.A CIVIL APPEAL NO.06 of 2021

*(Being High Court, Commercial Division, Commercial Case No. of of 2019,
Lilongwe Registry)*

BETWEEN

ROSELYNE MANDALA.....APPELLANT

AND

ALLIED FREIGHT AGENCIES.....RESPONDENT

CORAM: HON. JUSTICE L.P. CHIKOPA SC, DEPUTY CHIEF JUSTICE
HON. JUSTICE F. E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI SC, JA
HON. JUSTICE I.C. KAMANGA SC, JA
HON. JUSTICE M.C.C. MKANDAWIRE SC, JA
HON. JUSTICE S.A. KALEMBERA SC, JA
HON. JUSTICE D. MADISE SC, JA
HON. JUSTICE R. MBVUNDULA SC, JA
HON. JUSTICE D. KAMANGA SC, JA
K. Soko, of counsel for Appellant
F. Kaduya, of counsel for Respondent
E. Minikwa & C. Fundani, Recording Officers
I. Namagonya and E. Msimuko, Court Reporters

JUDGMENT

Madise SC JA

Introduction.

1. My Lords and my Ladies this is the unanimous and perfected order of the Court. The appellant is a registered company in the business of, inter alia, freight forwarding and customs clearing. The respondent is also an agent for Be Forward Limited a company which orders cars from Japan. The appellant was a customer of the respondent and had bought vehicles from them on a number of occasions. On 11th July, the appellant purchased a 4x4 Nissan Dualis from Be Forward Limited through the respondent. On the way to Blantyre, the vehicle was involved in an accident. The respondent bought another vehicle and when it was delivered to the appellant alleged, she discovered that it was a 4x2 and not 4x4. The appellant alleged that she had inquired from an employee of Be Forward that she wanted a 4x4 vehicle and the said employee assured her that the vehicle she was buying was a 4x4.
2. When the vehicle arrived, she refused to accept the vehicle as it was not what they had agreed. The respondent offered to replace the car with a 4x4. They told the appellant to add MK1, 446, 714.00 and MK1, 028,856.00 being the additional cost of the purchase price and customs duty respectively but the appellant refused. This notwithstanding the respondent bought the 4x4 and registered it in their name. when the vehicle came to Malawi, the appellant refused to make the top up payment for the 4x4. The respondent ended up having 3 vehicles in their possession; the one which had been involved in an accident, the second 4x2 which had been bought as a replacement vehicle and the 4x4.
3. On 8th January, 2019, the respondent [claimant in the court below] commenced proceeding against the appellant [defendant in the court below] seeking the cost of the replacement vehicle, valued at MK1, 446,714.00, MK1, 028, 856.00 being additional costs of the purchase price and customs duty, storage costs from the day the vehicles were rejected to acceptance date or judgement date. The matter in the court below was before Honourable Justice A. Mtalimanja. On 30th January, 2019, the appellant filed a defence and counterclaim. She alleged that there was misrepresentation on the part of the respondent's employee and as a result she counterclaimed for the sum of USD5, 407.00 being the cost of

procuring a Nissan Dualis, Mk2, 366, 222.00 being customs duty paid on the Nissan Dualis, damages for the loss of use from September 2017 to date of judgement and damages for breach of contract.

4. On 22nd March, 2019, the respondent filed an application for summary judgement and on 23rd September, 2019, the court entered summary judgement against the appellant on the basis that the appellant had signed a Vehicle Purchase Agreement which had described the type of the vehicle which would be purchased. Again the appellant had deposited the money after the signing therefore she was bound by the agreement. More importantly, as the appellant had not raised the issue of misrepresentation in her defence she could not rely on it as she was bound by her pleadings.
5. The Honourable Judge further stated that the appellant's defence did not disclose an arguable case. She further observed that the issue of misrepresentation was only raised in the counter-claim and not in the defence. Consequently, the court entered summary judgement against the appellant and costs were awarded to the respondent. In a sudden turn of events the court below stayed the execution of the summary judgement and ordered that the counter-claim which was a separate action should proceed to trial. On 11th November, 2019, the respondent made an application to set aside the order for stay of execution and strike out the counter-claim. The order was duly granted on 9th December, 2019. On 16th September, 2020 the appellant obtained a stay of execution of the summary judgment pending the determination of this appeal. A notice and grounds of appeal were filed in the court below on the same day.

Grounds of Appeal

6. The notice of appeal had the following grounds:
 - (1) The learned Judge erred in law when she allowed the respondent's application for summary judgement notwithstanding the appellant's arguable and bona fide defence.
 - (2) The Honourable Judge erred in law in both law and fact in failing to find the contract for the purchase of the motor vehicle between the appellant and the respondent was partly oral and partly in writing.

- (3) The Honourable Judge erred in law in holding that, in summary judgement application, the defendant can only demonstrate that she has an arguable defence if the defence is disclosed in the pleadings.
- (4) The Honourable Judge erred in law in attaching no weight to the appellant's sworn statement in opposition to the application for summary judgement in determining whether or not she had no arguable defence to the claimant's action.
- (5) In granting the application for summary judgement, the Honourable Judge erred in law in failing to make a distinct finding on whether or not there was need for the matter to proceed to trial as required under Order 12 rule 25 (2) (b) of the Courts (High Court) (Civil Procedure) Rules.
- (6) The Honourable Judge erred in law in finding that the appellant's counterclaim disclosed no reasonable cause of action.

7. The issues

The following issues were isolated:

- (1) Whether the Summary Judgement was properly entered.
 - (2) Whether in the circumstance of the case, it was proper to strike out the counter claim.
8. The appellant argued that it is settled law that a defendant can oppose an application for summary judgement if he is able to show that he has a good and arguable defence in the sworn statement. Hence a person is not restricted to his pleadings or statement of case if he is showing that the matter needs to proceed to trial. That the judge in the court below failed to consider the sworn statement but only focused on the pleadings.
9. Counsel for the appellant further argues and submitted that the Judge failed to consider the other pre-conditions for allowing a summary judgement, and that she only focused on one condition which is a good and arguable defence. Counsel further argued that parole evidence cannot be admitted to contradict a written contract. But where the contract is partly oral or partly in writing, parole evidence can be allowed to ascertain the full terms of the contract and rights of the parties. The appellant submitted

that there was no evidence that the parties had agreed that the vehicle was a 4x 2 and not a 4x4 but there was evidence that there were representations by the claimant to the defendant and these needed to be examined at full trial.

10. In conclusion the appellant submitted that the court below was dealing with the application to strike out the counterclaim, it was influenced by its findings on the previous applications for summary judgement. That since the entering of summary judgement against the appellant was an error, striking out of the counter claim was also erroneous and ought to be set aside.
11. The respondent submitted that the entering of summary judgement was occasioned because the appellant's defence was not reasonable and could not be sustained. It was also argued that the defence was based on the fact that she had purchased a 4x4 when the documents clearly indicated that she had purchased a 4x4 Nissan Dualis. The respondent further submitted that the court had considered all pleadings and sworn statement in arriving at its decision. And that counter claim is claim on its own and the summary judgement entered against the defendant was for the initial claim and not the counter claim. The respondent further submitted that the court only considered the initial claim and stayed the execution pending the hearing of the counterclaim thereby doing justice to the appellant.
12. In conclusion the respondent stated that the appellant never argued that the misrepresentation was part of the contract, only that she was induced into entering the contract. A contract does not become partly written just because the appellant has sought an opinion which was given to her.

The determination

13. The starting point is Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules which provides that
A claimant may apply to the court for summary judgement where the defendant has filed a defence but the claimant believes that the defendant does not have a real prospect of defending the claim.
14. Again, Order 12 r. 25 (2) of CPR 2017 states that: -

Where the Court is satisfied that -

- (a) The defendant has no arguable defence to the claim or part of the claim as presented in the application; and
- (b) There is no need for a trial of the application or that part of the application, the Court shall-
- (c) Give judgement for the applicant for the application or part of the application; and (ii) make any other order the Court deem appropriate.

15. Lastly, Rule 26 of the CPR 2017 provides that:

The Court shall not enter summary judgement against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law.

16. We are guided by the decision in **Hasil Bumi Perumahan Sdn BHD & Others v United Malayan Banking Corp** [1994] 1 MLJ 312 (SC), the Malaysian Supreme Court had this to say:

"in our view, in order to succeed in his application under these orders, the applicant must show that he has a defence which has some merits and which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prime facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail."

17. In an application for summary judgement the court considers whether the claimant has a "realistics" as opposed to a "fanciful" prospect of success. And a "realistic" claim is one that carries some degree of conviction. The court must be convinced that there is a genuine claim that is more than merely arguable. It is not necessary for the court to conduct a mini-trial in reaching its conclusion. To the contrary this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court.

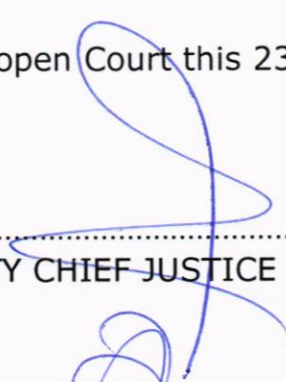
18. We are of the considered view that for the court to enter summary judgement against the defendant the claimant must satisfy the court that the defendant does not have any bona fide answer (defence) to the statement of claim. In this matter it is clear that the defendant in the court below had a clear defence on the issues which were raised in the statement of case. Additionally, we find that the counter claim was well grounded in

law and fact and this could have necessitated the holding of a trial to allow further investigation on the issues in contention.


19. The case of ***Standard Bank Limited vs Tourism Investments Limited Euro Industries Limited*** MSCA Civil Appeal Number 17 of 2018 gives clear guidance on how a summary judgement should be entered. It is clear that the Honourable Judge in this case misdirected herself on the law. We invite the court below to have recourse to the various decisions of this Court on this point where the position is well elucidated that summary judgement should not be entered in cases where there are, at the very least, disputed issues of material facts.
20. Lastly, Order 7 of Courts (High Court) (Civil Procedure) Rules states as follows:
Rule 15
Where a defendant in a proceeding wants to make a counterclaim instead of bringing a separate proceeding, the defendant shall include details of the counterclaim in the defence
Rule 16
The counterclaim under rule 15 shall-
 - (a) be shown clearly as the counterclaim; and
 - (b) set out details of the counterclaim in the defence.
21. The law as cited above is very clear on how a defendant should file a counter claim. There is no need for a separate trial. We therefore find that the Honourable Judge in the court below misdirected herself by failing to deal with the counter claim as being a challenge to the main claim. In the normal course of things where there is no summary judgement the two are heard at the same time and there is one judgement. However, in this case, there is a summary judgement and in the absence of an application by the claimant to strike out the counter claim, the counter claim was supposed to proceed on its own merit.
22. In conclusion we find that the application that was before the Honourable Judge was made under Order 12 r. 23 of the Rules, which provides for summary judgement and it is restricted to defence only. Therefore, the issue before the judge was the issue of summary judgement not the counter claim. However, the Judge proceeded to handle the issue of misrepresentation which was the basis of the counter claim in an application for summary judgement.

23. In these premises we allow the appeal. The summary judgement and striking out of the counter claim are set aside. The matter is remitted back to the High Court for trial before a different Judge. The case should conclude within 90 days. Costs are exclusive preserve of the Court but they normally follow the event. We award them to the appellant.


Pronounced in open Court this 23rd day of May 2023



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HON. DEPUTY CHIEF JUSTICE L.P CHIKOPA SC



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HON. JUSTICE F.E. KAPANDA SC, JA



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HON. JUSTICE H.S.B POTANI SC, JA



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HON. JUSTICE I.C KAMANGA SC, JA




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